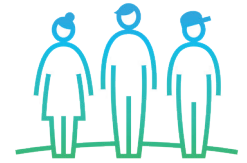




LIABILITY TO INDIVIDUALS ON LAND



CORE TOPICS:

- Civil and criminal liabilities relating to individuals entering land.
- Discharging liability and defences for rewilders.

KEY TAKEAWAYS:

- Whether or not civil liability will arise will depend on the nature of the land, whether or not the injured person had permission to enter the land and any steps taken to prevent the injury or damage occurring.
- Employers and self-employed persons who conduct an undertaking, have to take steps to ensure that they do not expose employees and third parties to health and safety risks. Failure to do so may result in criminal liability.

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1. CIVIL LIABILITY

1.1 Overview of civil liabilities

Relevant legislation

The two key pieces of legislation governing civil liability to individuals entering a landholder’s land are:

- Occupier’s Liability Act 1957 (OLA 57), which applies to lawful visitors entering or on the land (referred to in this note as “visitors”); and
- Occupier’s Liability Act 1984 (OLA 84), which applies to all others entering or on the land, including trespassers.

Additionally, the Countryside and Rights of Way Act 2000 (CROW) and the Marine and Coastal Access Act 2009 (MCAA) can alter the duty and standard of care owed to visitors on open access land and the coastal margin, respectively.

This note considers an occupier’s potential liability under OLA 57 or OLA 84. It does not consider common law negligence which regulates liability falling outside of an occupier’s ‘occupancy duty’, such as accidents arising out of unsafe activities conducted on the land itself¹.

Summary

The following table serves as a summary guide to the issues of civil liability considered in this briefing. It considers the two main elements that influence the standard of care expected of you towards people entering their land under civil law: a person’s entry status and the type of land in question. Other relevant factors can be found in the remainder of this note.

	Visitor	Non-visitor	
Private Land	<p>Standard:</p> <p>Liability may be limited or reduced through prior agreement in some circumstances.</p>	<p>Standard:</p> <p>Duty arises only if requirements under Section 1(3) OLA 84 are satisfied.</p> <p>Only applies to death or personal injury.</p>	
Public right of way*	<p>Standard: N/A</p> <p>People on public rights of way do not fall within the definition of lawful visitor because they are exercising a public right. Liability will fall on the local highway authority.</p>	<p>Standard: N/A</p> <p>The duty of care under OLA 84 towards non-visitors does not arise to those using public rights of way.</p> <p>Liability will fall on the local highway authority.</p>	
Open access land*	<p>Standard: N/A</p> <p>People entering open access lands are normally regarded as non-visitors unless a specific invitation was made.</p>	<p>Natural features</p> <p>Standard: N/A An occupier owes no duty in relation to “the existence of any natural feature.”</p>	<p>Manmade structures</p> <p>Standard: Lower standard due to added consideration not to overburden occupiers.</p>
Coastal margins*	<p>Standard: N/A</p> <p>An occupier owes no duty for any injury caused by “a risk resulting from the existence of any physical feature (whether of the landscape or otherwise).”</p>		

* Note that a duty can still be found on public rights of way, open access land and coastal margins if the occupier has the intention of creating a risk or is being reckless as to whether that risk is created². They will not escape liability in such situations.

1.2 Duty of care to visitors

The OLA 57 and OLA 84 only seek to replace the previous common law rules (e.g., case law) in relation to identifying the circumstances in which an “occupancy” duty of care may exist. The common law rules may still be relevant in identifying the person on whom the duty is imposed (the ‘occupier’) and the person to whom the duty is owed (either ‘visitor’ or ‘non-visitor’) under the Acts.

What is a “visitor” for these purposes?

A “lawful” visitor is either an individual who has express permission, implied permission, or a lawful right of entry. For example:

- Members of the public invited onto the rewilding land for educational or recreational purposes, such as wildlife safari tours (whether free or paid for).
- Contractors that require entry onto the land to carry out relevant works for rewilding projects.
- A police officer that enters the land in performance of their duties.
- A person on a public right of way does not fall within the definition of a lawful visitor because that person is exercising a public right³. Rewilders therefore do not owe a duty under OLA 57 to people using public rights of way across their land. Legal liability for accidents occurring on a public right of way will fall to the relevant authority. However, you should still act reasonably because a user of a right of way may still be able to claim at common law against an occupier who has been malicious or grossly negligent with the state of their land (see *Rewilding in England and Wales: Public access* note for information on a landholder’s responsibility to keep public rights of way clear of obstruction).

What level of care is owed to visitors?

Occupiers of premises owe a duty of care to all visitors to take such care as is reasonable in all the circumstances to see that a visitor will be reasonably safe when on or using the premises for the purposes for which they have been invited or permitted. If an occupier has not acted reasonably in keeping their premises safe, visitors may be able to claim against the occupier for both personal injuries suffered, and/or the loss of, or damage caused to their property on the land.

When a duty of care is found, occupiers can discharge any possible liability towards individuals if they satisfy the standard of care expected of them. The standard of care is fact specific and may vary depending on the circumstances. For example:

- An occupier’s standard of care will be increased when dealing with children, as the occupier must be prepared for children to be less careful than adults⁴. In light of this, it may be wise for an occupier to carry out a risk assessment to identify potential hazards for children specifically, if relevant. For example, if visitors are invited or permitted onto the land to forage for wild food, then it may be foreseeable that children will be less discriminating than adults about poisonous berries that the occupier knows or should know are growing on their land. The occupier must then ensure that the protection mechanisms adopted against a specific danger are sufficiently capable of protecting children if there are expected to be visitors. For example, a sign posted on the top of a fence may not serve any purpose in protecting a child who is unable to see and/or read it. As the risks associated with children are that much greater than adults, some rewilding projects have restricted the age of children permitted on the site.
- Conversely, an occupier’s duty of care can be lessened when dealing with individuals on the land that are in the “*exercise of their calling*”⁵, e.g., people carrying out their trade or profession. It is assumed that such visitors will have a greater awareness of the potential risks, dangers and associated

precautionary measures. For example, a contractor hired to carry out works on the land is generally expected to be capable of ensuring their own safety when carrying out those works due to their experience in the field. However, an occupier will still need to act reasonably.

Who is an “occupier” and who owes this duty?

An “occupier” need not be the rewilder or freeholder, nor need they live at the premises; it is anyone with sufficient control over the land (which we assume to be the case for most rewilders). For example, a rewilder with permission to carry out rewilding activities on another person’s land may still be regarded as the occupier. Note that “*premises*” in this context are broadly defined to cover land, water and buildings, as well as any fixed or moveable objects such as vehicles and scaffolding.

1.3 Duty of care to non-visitors (including trespassers)

Occupiers of premises may also owe a duty of care to “*persons other than his visitors*” (‘non-visitors’), including people who enter the land without consent, although such individuals are generally said to enter premises at their own risk.

What does “trespass” mean?

“*Trespass*” has been confirmed to mean: (i) the lack of permission or invitation; and (ii) being in a location where one has no permission to be⁶. You do not need to expressly tell a person to keep off your land, and in fact need not even be aware of the person’s presence on the property to make them a non-visitor⁷.

However, the definition of “*trespass*” may vary in certain circumstances, depending on the individual’s mental state and whether they reasonably ought to have known they were trespassing⁸. A person who enters a restricted area by mistake will not be a trespasser, and will likely be given “*visitor*” status unless captured by another category of “*persons other than visitors*”⁹, such as lawful authorities. In contrast, an individual who enters a restricted area as

a trespasser but changes their mind and no longer intends to trespass, does not escape their trespasser status while still in the restricted area.

For example, trespassers include:

- A hunter that enters land to hunt without the permission to do so (this may also involve other poaching-related offences that are beyond the scope of this note).
- A visitor who wanders off a public right of way onto a different part of the land not covered by the right of access.
- A visitor invited onto the land for a specific recreational purpose (for example, bird watching) who then acts in a way that is far beyond anything that could be implied to be part of that purpose, such as cutting down a tree and lighting a fire.

What duty of care is owed to non-visitors / trespassers?

A duty of care towards non-visitors will arise if the occupier:

- is aware of a particular danger on the premises or has reasonable grounds to believe that it exists;
- knows or should know that people may be exposed to the danger; and
- is aware that the risk is one against which, in all the circumstances of the case, they may reasonably be expected to offer some protection¹⁰.

If a duty of care is found, the occupier must **take such care as is reasonable in the circumstances** to ensure that the non-visitor does not suffer injury as a result of the relevant danger. However, the standard of care owed to trespassers is less onerous than the duty owed to visitors. Further, an injured trespasser can only claim for death or personal injury, and it does not apply to loss of, or damage to, property. *Does this duty of care arise in relation to public rights of way?*

It is important to note that the duty of care under OLA 84 towards non-visitors also does not arise to those using public

highways¹¹. This includes members of the public making use of public rights of way, including footpaths, bridleways and byways. Any liability will fall on the relevant authority in such circumstances¹².

1.4 What duty of care is owed to individuals entering open access land?

Where individuals enter land designated as ‘open access’ land under CROW, they are not considered “visitors” and the higher standard of care does not apply, therefore reducing the burden for occupiers. Further, the question of whether or not the lesser duty of care owed towards non-visitors applies will generally depend on whether hazards found on the land are derived from natural features or are manmade. No duty of care is owed for risks that arise from the “natural features of the landscape”.

However, if an occupier has the intention of creating a risk, or is reckless about whether that risk is created, this distinction will not apply and the occupier can be liable for injuries caused by both manmade structures and natural features.

Natural features

On open access land, occupiers owe no civil law duty in respect of risks arising from¹³:

- any natural feature of the landscape, including any tree, shrub or plant;
- any river, stream, ditch or pond, whether natural or not; and
- people passing over, under or through a wall, fence or gate except by proper use of the gate or stile¹⁴.

EXAMPLE 1

A person enters rewilding land designated as open access and is injured by a falling tree branch.

As the land is designated as open access, a tree branch

is included in the definition of a natural feature and there will be no obligation on you to put in place protection measures against this danger.

However, if you intentionally or recklessly exposed visitors to such danger (for example, recklessly permitting a half-sawn tree to stand without any protection measures) then, subject to any other relevant circumstances, they might still be found liable for the injury caused to the visitor.

Manmade structures

Occupiers may be liable for injury caused by manmade structures on open access land. Therefore, it may be beneficial from a liability perspective for occupiers with open access land to remove or make safe (as far as possible) man-made structures from their land.

PRACTICAL POINT

One of the key objectives of rewilding is to restore the environment’s natural landscapes and processes over time. A common initial step involves removing man-made structures, followed by the reintroduction of natural processes. For example, the removal of dams can allow for aquatic life to move freely along the watercourse.

The removal of man-made structures, especially those that are disused, may be beneficial from a liability perspective as it potentially reduces man-made hazards to people entering the land, as well as the need to maintain such structures (which is helpful to demonstrate that rewilders have discharged their duty of care to take reasonable steps to ensure their premises are safe).

However, rewilders should also be cautious about hazards that can be created by the removal of man-made structures. For example, the removal of a dam may lead to a faster flowing river, which may make it unsafe for people to swim or cause an overflow of water into neighbouring land. In the latter situation, an action may arise in nuisance (see briefing on *Rewilding in England & Wales: Liability to Neighbouring Landholders*). Where appropriate, a detailed risk assessment of the consequences of removing man-made structures should be carried out, as well as identifying relevant remedial or mitigating actions.

For various reasons, it may not always be feasible for an occupier to remove all man-made structures on the land. Therefore, a risk assessment involving the identification of all remaining man-made structures left on the land and the evaluation of the extent of danger associated with each identified structure is important to assist you in determining the appropriate protection measures and to show that they have been acting reasonably.

If it is found that the occupier owes a duty of care and is potentially liable for injury incurred on open access land, when determining liability, a court will have regard to:

- the need to avoid over-burdening occupiers of open access land;
- the importance of maintaining the character of the countryside; and
- any relevant guidance given by Natural England (NE) and Natural Resources Wales (NRW) under CROW.

EXAMPLE 2

A person wanders off a designated pathway on rewilding land and injures themselves by falling into a hollow created by an ancient well.

The ancient well may fall under the definition of manmade structures (although this might be arguable

depending on the circumstances) such that you should consider putting in place safety measures. However, on open access lands, the standard of care is lowered by the resourcing consideration, and you will not be required to go out of your way to protect against that danger.

As a practical point, rewilders should mention to their insurance broker any such characteristics of the land so that if appropriate, they may be specifically noted on the rewilders' public liability insurance policy.

Finally, it should be noted that if an occupier of open access land makes specific invitations to individuals onto the land, such as to bring school students onto the land to learn about rewilding, the occupier will be subject to the enhanced duty of care owed towards visitors.

1.5 What duty of care is owed to individuals entering the coastal margin?

Occupiers' liability along the coastal margin in England is governed by MCAA, and the duty of care towards the public is even more limited than on open access land. The 'coastal margin' is land identified from the England Coast Path and includes all land between the path and the sea, which may also extend inland from the path in some situations¹⁵. Guidance from Natural England clarifies that a rewilders or occupier is not liable for any injury caused on the coastal margin by any physical feature on the land, whether natural or man-made¹⁶. As such, an occupier of such land owes no duty to any person for any injury caused by "a risk resulting from the existence of any physical feature (whether of the landscape or otherwise)"¹⁷.

However, as with open access lands, an occupier can still be subject to the enhanced duty of care owed towards visitors if they specifically invite individuals onto the land even on coastal areas.

1.6 Does the keeping of animals impact the duty of care?

As part of a rewilding project, a landholder may decide to keep or reintroduce key species of animals on their land. The risk of animals causing injuries to persons entering the land cannot be ruled out. If an individual sustains an injury caused by the animal(s), a potential cause of action can arise under OLA 57 or OLA 84 if it specifically relates to a rewilders' 'occupancy duty' where they have failed to take reasonable steps to keep the premises safe. However, claims are most commonly brought under the Animals Act 1971.

As discussed in the *Rewilding in England & Wales: Liability for Damage Caused by Animals* briefings, an occupier may be liable if an animal injures someone or causes damage, and the occupier was the 'keeper' of that animal and the other requirements for liability are established¹⁸.

Although there are currently no reported cases of personal injury or damage caused to a member of the public by an animal from a rewilding project, there are numerous reported instances of farm animals causing such injury to members of the public. In some of these cases, the farmer has been found to be in breach of their health and safety obligations under the HSWA. This is considered in more detail under section 2 and is something that anyone keeping animals on their land should take particular notice of.

If an animal does escape from the project land and causes harm to neighbouring land, an action in nuisance may apply (see briefing on *Rewilding in England and Wales: Liability to neighbouring landholders*).

1.7 Is there any additional duty of care for land which includes mines or quarries?

Rewilders need to be aware of any disused mines and quarries on their land, especially where they are publicly accessible. Landholders owe a statutory duty to ensure that any abandoned and disused mine or quarry is securely fenced so that entry is restricted to prevent persons from accidentally falling in¹⁹. The duty to properly enclose an abandoned mine exists even if the public does not have

access to it. A person that accidentally falls into a mine or quarry and injures themselves due to a lack of proper enclosure may bring a claim in damages against you.

Occupiers undertaking rewilding projects that involve land with quarries or mines should obtain specialist advice where necessary.

1.8 Can landholders exclude or discharge civil liability or rely on any defences?

Excluding liability

An occupier may reduce their civil liability by way of prior agreement with visitors on their land. This can be done, for example, through tickets issued to visitors, the putting up of signs disclaiming liability at all entrances and terms and conditions being listed on their website. Whilst the possibility of limiting liability through prior agreement exists, it is by no means a guarantee that occupiers can avoid liability. Generally, the law expects occupiers to act reasonably in the circumstances; if their actions, or lack thereof, fall below the standard of reasonableness then they may be found liable for harm caused to individuals on their land. It is therefore advisable for occupiers to put in place sufficient measures to ensure visitors are safe on the land when using it for the purpose for which they have been invited or permitted to enter.

In this context, rewilders should be aware of the Unfair Contract Terms Act 1977 (“**UCTA**”). UCTA applies to business occupiers, such as those that charge for access onto their land. Where UCTA applies, rewilders cannot exclude their liability for death or personal injury resulting from negligence²⁰. For other loss or damage suffered (such as property damage), you can only exclude or restrict your liability for negligence if you satisfy the requirement of reasonableness²¹. It should be noted that UCTA does not apply where access is granted to individuals for educational or recreational purposes that are *distinct* from the occupier’s business²². However, as noted above, rewilders must act reasonably in the circumstances. Please seek advice from a legal professional if you are unsure as to the application and/or scope of UCTA.

The Consumer Rights Act 2015 (“**CRA 2015**”) also bars exclusion or restriction of civil liability for death or personal injury resulting from the breach of the duty of care imposed by OLA 57. There is also an implied term that services are to be performed with reasonable care and skill. Please seek advice from a legal profession if you are unsure as to the application and/or scope of CRA 2015.

Examples of when you can or cannot limit your liability through prior agreement:

EXAMPLE 3

You invite people onto your land for free wildlife safari tours for educational purposes or for other recreational activities, such as bird watching. During the visit, a visitor trips and injures themselves.

There is the possibility for you to limit your liability in such circumstances. Since the visit does not provide any commercial benefit to you, UCTA does not apply. Whether you can limit your liability will depend on the particular facts of the case. Limitation of liability may be achieved through, for example, the terms of the ticket issued to visitors, appropriate signage at land entry points and/or warnings of potential dangers listed on your website.

The methods described above demonstrate some of the ways that rewilders can help protect themselves from liability in certain circumstances and reduce the need for them to spend significant resources and effort on maintaining the premises, especially since a key step to rewilding involves leaving land untouched for long periods of time.

However, you should always act reasonably (for example, not intentionally introducing danger onto the premises).

Please see Part 2 for potential liability under section 3 HSWA, which will only apply where you are running a business or enterprise.

EXAMPLE 4

You invite people onto your land for yoga and charge for the activity. A participant is injured during the activity from a falling tree branch.

There is a commercial element involved and therefore UCTA applies – you are not able to limit or exclude liability for any death or personal injury suffered as a result of their negligence. Consequently, you may be liable for the failure to properly maintain trees in the vicinity where individuals are expected to be practising yoga, as this may fall below the standard of reasonableness.

Whilst limitation or exclusion of liability for death or personal injury as a result of the rewilders’ own negligence is not possible, a rewilders using the land for commercial purposes can still seek to limit their liability for other forms of damage through the methods described in practical example 1 (e.g., through the terms of a ticket). Whether you are successful in doing so will depend on the particular facts and whether they acted reasonably.

You should also consider potential liability under section 3 HSWA (discussed in Part 2).

Discharging liability

The duty of care owed by an occupier towards people entering their land can be discharged (or reduced) if they take such steps as are reasonable to give suitable warning of the danger concerned or to discourage such individuals from incurring the risk. If fully discharged, the landholder is not liable for any harm that may be suffered by a person arising from the danger.

This section discusses discharging liability to both visitors and non-visitors. It is important to bear in mind when reviewing this section that since the standard of care owed to non-visitors is lower compared to the duty owed towards

lawful visitors, it will generally be easier for rewilders to discharge their duty against trespassers since, as previously discussed, trespassers enter premises at their own risk.

To sufficiently discharge this duty of care, occupiers must provide “**reasonable**” protection measure(s) and/or give people sufficient warning(s) proportionate to the degree of danger in question. “*Danger*” in this regard means “*dangers due to the state of the premises or due to things done or omitted to be done on them*”²³. For example, when determining the extent of an occupier’s liability, a court will consider whether it was reasonable given the circumstances to provide a warning to visitors and whether any warning enhanced the visitor’s safety, taking into account the extent of the warning and the level of danger.

When considering if an occupier has adequately discharged this duty, all the circumstances of the case will be considered, including:

- the purpose for which a visitor was invited onto the premises;
- the obviousness of the danger or risk (e.g., its location, visibility, signage, the frequency with which the area is visited etc.);
- the magnitude and likelihood of the risk, and the consequences of it occurring;
- the effectiveness of warning notices;
- the age and capacity of the person entering the land;
- the purpose of the visit and the expected conduct of the person entering the land;
- self-accountability (e.g., to what degree can or should the person entering the land be aware of obvious dangers and take care to avoid ordinary risks?);
- any processes and procedures the occupier has in place to assess and mitigate risk; and
- any defences available (see below).

EXAMPLE 5

A person is invited onto the rewilding land for foraging workshops and consumes some wild poisonous berries growing on the land, causing them to fall seriously ill.

A rewilder that invites visitors onto their land for foraging activities should ensure that they take reasonable steps to ensure visitors are reasonably safe. For example, they could adopt measures including:

- if practical, designating a specific land area for the activity that is free from poisonous plants;
- conducting briefings at the start of the activity and placing signs in prominent places, warning against the consumption of fruits and plants without appropriate supervision;
- if children are expected to participate in the activity, rewilders must expect them to be less careful than adults and therefore additional measures, such as mandating the need for them to be supervised at all times, should be implemented.
- If you fail to adopt reasonable measure(s) sufficient to protect individuals against the danger, they may fall below the reasonable standard of care expected of them and be found liable for harm suffered by visitors when partaking in the activity.
- For trespassers entering the land, the occupier has a lower standard of care to protect them from the danger. Some of the previously mentioned measures (for example, activity briefings) will also not be applicable.

Defences

In addition to the above, an occupier may be able to rely on certain defences to limit or discharge their civil liability in the event of harm caused to people entering their land. An occupier may argue that the visitor or non-visitor’s own

actions caused or contributed to the damage or injuries suffered if they have failed to take reasonable care. This defence is known as contributory negligence.²⁴

The duty of care imposed on landholders including rewilders also does not extend to the supervision of activities carried out by people on their land. If a person voluntarily accepts an obvious risk while on the land, the occupier does not owe them a duty of care with regard to the self-inflicted injuries.²⁵ Therefore, people that carry out adventure sports such as rock climbing, mountain biking or horse riding in rewilded premises will be largely responsible for themselves since they have voluntarily chosen to participate in a risky activity and should themselves carry out the relevant risk assessments, such as to examine for the presence of loose rock and the suitability of any protection whether fixed or not.

You are also not responsible for any injuries sustained by a person carrying out activities that are prohibited on their land.

EXAMPLE 6

A person dives off a cliff into a lake within a rewilders’ land and suffers injuries as a result.

An occupier’s potential liability will depend on whether a particular action by a person is inherently dangerous. Here, it is unlikely that you will be found liable for the injuries suffered since it was the act of diving off the cliff that caused the injury rather than the cliff itself. Rewilders and land managers, including rewilders, are not generally liable for voluntary risks undertaken by people on their land.

However, if you are aware of visitors frequently jumping from the cliffs, you may wish to take steps to ward people off the area (for example, by putting appropriate warning signs in place). This can help the rewilder demonstrate that they have been acting reasonably in the circumstances to keep people reasonably safe on your land.

2. OVERVIEW OF CRIMINAL LIABILITIES UNDER SECTION 3 OF THE HEALTH AND SAFETY AT WORK ACT (“HSWA”)

2.1 Scope of section 3 HSWA

In circumstances where rewilders carry out rewilding activities as part of a business or enterprise, there may be additional duties in the context of health and safety laws.

Whilst the HSWA is primarily concerned with the legal obligation of an employer towards its employees to safeguard their health and safety at work²⁶, section 3 of the HSWA also places an obligation on employers and self-employed persons for third parties (such as visitors) whose health and safety may be impacted by the activities of that business or enterprise. Employers or those that are self-employed are required to conduct their undertakings in such a way as to ensure, so far as is reasonably practicable, that third parties who may be affected by their activities are not exposed to risks to their health or safety.²⁷ For section 3 to apply, there must be:

- a duty-holder – either an employer or a self-employed person;
- a risk to the health or safety of a person who is not the employee of the duty holder or the self-employed duty holder themselves; and
- that risk must arise from the conduct of the duty holder’s undertaking.²⁸

The scope of the duty under section 3 is very broad. The HSWA does not distinguish between visitors and non-visitors and applies generally to third parties. Therefore, employers and self-employed persons must take into account the health and safety of any individual regardless of whether they are invited onto the land. In certain high-risk industries, the duty to ensure individuals are not exposed to health and safety risks may present itself more readily. For example, where forestry work is involved, individuals have a responsibility to manage public safety such that rewilders and forestry works

managers must plan and coordinate safety measures, and operators on forest sites must implement them – proximity areas, harvesting sites and haulage routes should be carefully considered.²⁹

Note specifically that in the past, the HSE have prosecuted a farmer for breaching section 3 HSWA, following the death of a walker who was killed by cattle when on a public footpath situated on that farmer’s field.³⁰

The broad applicability of section 3 is balanced by a policy developed by the Health and Safety Executive (HSE), Britain’s national regulator for workplace health and safety. The policy aims at guiding enforcing authorities to exercise their discretion by focusing on ‘health and safety priorities’, such as where there is a high level of risk involved (e.g., major hazards and construction) or whether enforcement would be in the interests of justice (such as those of the injured or bereaved)³¹, and to give less priority in other areas.³² In certain risk areas (e.g., reservoirs or where an adventure activity is undertaken), the HSE will generally not start to investigate injuries to non-employees, or complaints about risks to non-employees, unless the concerns highlighted in the preceding sentence are present.³³

2.2 What is an “undertaking” and when will HSWA apply to rewilders?

An ‘undertaking’ in this context means an enterprise or business. In a rewilding context, rewilders that receive any commercial benefit from their activities (whether it be, for example, from running yoga retreats, wildlife safaris or farming) are likely to fall within the scope of this duty under the HSWA.

2.3 What is required to comply with section 3 HSWA duty?

Employers and self-employed persons must ensure, so far as is “*reasonably practicable*”, that they do not expose third parties to health and safety risks. Such risks may encompass a broad range of issues relevant to land managers (such as rewilders) including injury caused by manmade or natural

features of the land, injury caused by animals and other risks to individuals, such as water pollution. It is important to note that a third party does not in fact have to be harmed for an offence to be committed under HSWA – there only has to be a risk of harm for liability to be found.³⁴

Appropriate risk assessments must be carried out to identify the risks to the health and safety of third parties as a result of an undertaking³⁵ and landholders should ensure that these are implemented / reflected in working practice and regularly updated. The risk assessment should include:

- identifying what could cause injury or illness in the business (hazards);
- deciding how likely it is that someone could be harmed and how seriously (the risk); and
- taking action to eliminate the hazard, or if this isn’t possible, to control the risk.

Depending on the nature of activity being undertaken, there is guidance published by the HSE to assist individuals in complying with the standards required by the law to keep their land safe for others. Rewilders carrying out business activities should follow such guidance and establish a safety management system based on acknowledged good practice. Two particularly relevant guides for rewilders are the Agriculture Health and Safety Guidance Note³⁶ and the Cattle and Public Access in England: Advice for Farmers, Rewilders and Other Livestock Keepers note.³⁷

To discharge the duty under section 3, the duty holder must act reasonably and balance the risk to others against the sacrifice (e.g., the money, time or resources) involved in taking the measures needed to avert the risk. If the risk is grossly disproportionate to the sacrifice, such as the risk being insignificant relative to the sacrifice, the duty holder is not required to take any further measures and so discharges the duty³⁸. This is a balancing exercise and highly fact dependent. An example is explored under practical example 7 below.

A breach of the health and safety laws under section 3 can give rise to criminal liability, resulting in a fine not exceeding £20,000 and/or imprisonment for a term not exceeding 12 months (on summary conviction) or 2 years (on indictment)³⁹. If you are intending on undertaking commercial activities on your land, please consult the relevant legal, industry and safety specialists for further advice.

EXAMPLE 7

A rewilder which undertakes his rewilding activities as part of a business carries out ground preparation work involving heavy machinery in preparing the land for rewilding.

Depending on the type of work being carried out, the land may be regarded as a hazardous worksite presenting health and safety concerns. Since the use of heavy machinery in ground preparation work is likely to create a hazard, the rewilder should undertake a risk assessment which could result in reasonably practical steps such as:

- informing the public about the nature of the works at the entrances to the site;
- applying for temporary diversion or closure of public footpaths;
- putting up warning and prohibition signs or barriers;
- using banksmen when working near areas of public access;
- implementing directional routes for timber movement, diversions and weight restrictions; and/or
- restricting road use⁴⁰.

Thank you to Clifford Chance LLP for their legal support in producing this briefing note.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. You should not assume that the case studies apply to your situation and specific legal advice should be obtained.

The hyperlinks to legislation, guidance and various other external sources within this briefing are correct as of 19 December 2022.

ENDNOTES

1. In *Fowles v Bedfordshire County Council* [1995] PIQR P380, the Court of Appeal held that there was negligence on the part of the Defendant but that the OLA 57 did not apply because the accident, being the lack of supervision of activities on the land, did not arise out of the unsafe condition of the premises themselves.
2. Section 1(6C), OLA84.
3. *McGeown v Northern Ireland Housing Executive* 1994 3 All ER 53.
4. Section 2(3), OLA 57.
5. Section 2(3)(b), OLA 57.
6. *British Railways Board v Herrington* [1972] AC 877.
7. *Baldacchino v West Wittering Estate Plc* [2008] EWHC 3386 (QB).
8. *Ovu v London Underground Ltd* [2021] EWHC 2733 (QB).
9. Section 1, OLA 84.
10. Section 1(3), OLA 84.
11. Section 1(7), OLA 84.
12. However, an occupier should still act reasonably. A claim may still be brought under common law against an occupier who has been malicious or grossly negligent with the state of their land.
13. Section 13, CROW.
14. Natural England: Open access land: management, rights and responsibilities.
15. See for more details at [NE: England Coast Path improving public access to the coast](#).

16. NE: Open access land and the coastal margin: how to restrict public access.
17. Section 1(6AA), OLA 84.
18. Section 2, Animals Act 1971.
19. Section 151, Mines and Quarries Act 1954.
20. Section 2(1), UCTA.
21. Section 2(2), UCTA.
22. Section 2, OLA 84.
23. Section 1(1), OLA 57 and OLA 84.
24. Section 1, Law Reform (Contributory Negligence) Act 1945.
25. Section 2(5), OLA57 and Section 1(6), OLA84.
26. Section 2, HSWA. The duty of employers to employees under HSWA is outside the scope of this briefing note.
27. Sections 3(1) and 3(2), HSWA. Please note that under section 3(2) self-employed persons have a duty to ensure that they themselves are not exposed to health and safety risks. The HSWA also sets out various other duties such as those owed by employers towards employees, employees towards themselves and to each other, and certain self-employed persons towards themselves and others. These duties are not covered by the scope of this briefing note. Please seek legal advice if needed.
28. Health and Safety Executive: Scope and application of section 3 HSWA.
29. Health and Safety Executive: Managing public safety. For further information, please see: <https://www.hse.gov.uk/treework/site-management/public-access.htm>
30. Health and Safety Executive: Farmer sentenced after walker killed by cattle.
31. Health and Safety Executive: Priorities for enforcement of Section 3 of the HSWA 1974 - July 2003 (rev April 2015).
32. Health and Safety Executive: Guidance for FOD in responding to (non-construction) public safety incidents where Section 3 of HSWA applies.
33. Health and Safety Executive: Further information.
34. Health and Safety Executive: Health and safety at work: criminal and civil law.
35. The Management of Health and Safety at Work Regulations 1999, section 3
36. Health and Safety Executive: Agriculture health and safety.
37. Cattle and Public Access in England: Advice for Farmers, Rewilders and Other Livestock Keepers.
38. Health and Safety Executive: Proving the offence: Edwards v National Coal Board [1949] 1 KB 704, CA; Austin Rover Group Ltd v HM Inspector of Factories [1990] 1 AC 619, HL.
39. Section 33(1)(a) and Schedule 3A, HSWA.
40. Ibid, 35.

WHO'S BEHIND THIS GUIDANCE?



This note is part of a range of information produced by Rewilding Britain and The Lifescape Project to provide practical guidance to rewilders. Each is designed to help rewilding practitioners across Britain overcome common barriers in their rewilding journey, as identified through conversations with members of our Rewilding Network.

Rewilding Britain's Rewilding Network provides a central meeting point for landowners, land and project managers and local groups in Britain, offering opportunities for collaboration and allowing smaller landowners to take on larger-scale rewilding together. If you find this useful, please consider joining the Network, where those in Britain can explore these issues further with others in the same boat.



The Lifescape Project is a rewilding charity using a multi-disciplinary approach to achieve its mission of catalysing the creation, restoration and protection of wild landscapes. Lifescape's legal team is working to support rewilders in understanding how the law applies to their activities and pursuing systemic legal change where needed to support the full potential of rewilding. These notes form part of Lifescape's Rewilding Law Hub which aims to provide a legal resource centre for those wanting to manage land in accordance with rewilding principles.



JOIN THE CONVERSATION

We'd love to hear what you've found useful in these notes and where we can help fill gaps in the guidance so that we can make sure they remain an up-to-date practical tool for rewilders.

Get in touch with us at:
Rewilding Britain: the Rewilding Network,
www.rewildingbritain.org.uk/rewilding-network

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